Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak

HIGH COURT (KUALA LUMPUR) — SUIT NO WA22NCVC-181–03 OF 2016
ABU BAKAR JAIS J
27 JULY 2016

Civil Procedure — Affidavit — Cross-examination of deponent to affidavit — Affidavit in support of application to strike out plaintiffs' suit — Application by plaintiffs to cross-examine deponent — Principles to apply — Whether court should exercise discretion to allow application — Whether three conditions for cross-examination as laid down in Tetuan Kumar's case satisfied — Whether plaintiffs' assertions in respect of impugned affidavit should be decided now or in hearing of striking out application

Evidence — Affidavit — Affidavit evidence — Whether statements made in affidavit and affirmed upon advise of solicitors protected by legal professional privilege — Evidence Act s 126(1)

The former Prime Minister of Malaysia of 22 years ('the first plaintiff') and two former members of the main political party forming the present Government of Malaysia ('the second and third plaintiffs') had filed an action against the current Prime Minister of Malaysia ('the defendant') in his personal capacity for committing two torts, namely the tort of misfeasance in public office and the tort of breach of fiduciaries in public office. It was the plaintiffs' case that the defendant as the Chairman of the Board of Advisors of 1Malaysia Development Bhd ('1MDB'), a company wholly owned by the Government of Malaysia, was guilty of certain financial improprieties in 1MDB. The plaintiffs claimed, inter alia, that amounts of RM2.6 billion and RM42m had been transferred from SRC International Sdn Bhd, a subsidiary of 1MDB, into the personal accounts of the defendant without any justification. The plaintiffs also alleged that the defendant had used his office and power as the Prime Minister to interfere and halt the investigations that had been initiated to investigate the fund transfers. The plaintiffs also averred that the government machinery had been used to harass and intimidate those who were critical of 1MDB and the defendant. By way of this action the plaintiffs sought, inter alia, various declarations, RM2.6 billion as exemplary damages and RM42m as aggravated damages to the Government of Malaysia. The defendant filed an application to strike out the plaintiffs' suit on the grounds that the defendant as the Prime Minister could not be legally considered as a public servant or public officer and that as such it was plainly wrong for the plaintiffs to sue him on the tort of

misfeasance in public office and the tort of breach of fiduciaries in public office. The striking out application was supported by an affidavit sworn and affirmed by the defendant. This was an application by the plaintiffs to cross-examine the defendant in respect of the affidavit made by him in support of his application to strike out of the plaintiffs' suit ('the affidavit'). The plaintiffs submitted that the three conditions necessary to justify cross-examination had already been satisfied and that there was a need for cross-examination of the defendant since both parties had disputed the assertions of each other. The plaintiffs also submitted that the defendant had submitted that the latter had contradicted himself in the affidavit by saying he was not a public servant or public officer but at the same time asserting that the plaintiffs were attempting to drive him from public office. In essence, the defendant recognised that the court had a discretion whether to allow for cross-examination, which depended on the facts of each particular case. However, the defendant submitted that there was no conflict in what was stated in the affidavit as the statements made in the affidavit were affirmed only upon advise by his solicitors. As such, the defendant submitted that there was no useful purpose in ordering a cross-examination as what was stated was protected by legal professional privilege, which entitled him not to answer. The defendant further submitted that the fact as to whether he was a public officer was a pure question of law that required no cross-examination.

Held, dismissing the application:

(1) Although O 38 r 2(2) of the Rules of Court 2012 allowed for the present application to be filed, this court had the discretion as to whether or not to grant the request to cross-examine the defendant. Further despite the discretion given, it ought to be appreciated that the request for cross-examination was rarely given. If the courts were to allow cross examination of a deponent of an affidavit for interlocutory applications for the slightest reasons, these applications would inevitably render the time and effort to prepare the affidavit evidence meaningless. As such, unless it could be shown that it was relevant and necessary such applications for cross examination should not be allowed (see paras 39–40 & 45–48).

(2) Upon perusing the three conditions for the cross examination as laid down in the case of *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638 ('*Tetuan Kumar*'s case') it was clear that the first two conditions imposed for the cross examination were satisfied, in that the plaintiffs had replied and disputed the relevant part of the defendant's affidavit and the proposed cross-examination was relevant to the issue raised in the defendant's application to strike out the plaintiffs' suit. However, the plaintiffs had not proven the third condition in *Tetuan Kumar*'s case because there was indeed sufficient evidence, material or basis to hear the striking out as the

defendant submitted on a point of law. The conditions in *Tetuan Kumar*'s case were not set in the alternative but cumulative. As such, all three conditions had to be satisfied but the plaintiffs had failed to prove the third condition (see paras 50–54).

(3) The plaintiffs' contention that the cross-examination was necessary because of the contradictions in the affidavit was without merit. Even if it was true that the defendant had contradicted himself, the plaintiffs could still argue this when arguing the merits of the striking out without the need to cross-examine the defendant now. In short, the contradictions, if any, should be addressed in the submissions by both parties in the course of the striking out application. Similarly, the credibility of the defendant may be challenged by the plaintiffs now but that decision as to his credibility could not be decided now. As such, the plaintiffs' assertions with regard to the impugned affidavit should be decided when the striking out was heard (see paras 55–59 & 63).

(4) The issue as to whether 'public office' was a question of fact that had to be determined first, even if true, would be of little or no significance to the present application to cross-examine the defendant. The court would be more likely to determine the meaning of that term without the input of the defendant in cross-examination at this stage. In the circumstances, the plaintiffs' present application should not be granted. Further, the position of the plaintiffs was not prejudiced and compromised by a refusal to grant the plaintiffs' present application (see paras 60 & 71).

(5) The defendant and any other deponents of an affidavit were expected to stand by the assertions made in their affidavit. Under s 126(1) of the Evidence Act 1950 only the defendant's advocate was estopped from revealing the communications he had with the defendant unless the defendant consented. There was no bar stipulated in that provision for the defendant to explain what was advised or communicated to him by his advocate or solicitor. However, it was clear that the impugned affidavit should not be decided now but only when the striking out application was heard (see paras 64–67).

[Bahasa Malaysia summary

Bekas Perdana Menteri Malaysia selama 22 tahun ('plaintif pertama') dan dua bekas anggota parti politik utama yang membentuk Kerajaan Malaysia yang sedia ada ('plaintif kedua dan ketiga') telah memfailkan tindakan terhadap Perdana Menteri Malaysia ('defendan') atas kapasiti peribadi kerana melakukan dua tort, iaitu tort misfeasans dan tort pelanggaran fidusiari dalam jawatan awam. Kes plaintif adalah bahawa defendan sebagai Pengerusi Lembaga Penasihat 1Malaysia Development Bhd ('1MDB'), sebuah syarikat yang dimiliki sepenuhnya oleh Kerajaan Malaysia, bersalah kerana salah laku kewangan tertentu dalam 1MDB. Plaintif mendakwa, antara lain, bahawa

jumlah sebanyak RM2.6 bilion dan RM42 juta telah dipindahkan dari SRC International Sdn Bhd, anak syarikat 1MDB, ke dalam akaun peribadi defendan tanpa sebarang justifikasi. Plaintif-plaintif juga mendakwa defendan telah menggunakan jawatan dan kuasa beliau sebagai Perdana Menteri untuk campur tangan dan menghentikan siasatan yang telah dimulakan untuk menyiasat tentang pemindahan dana. Plaintif-plaintif juga menegaskan bahawa jentera kerajaan telah digunakan untuk mengganggu dan menakut-nakutkan sesiapa yang mengkritik 1MDB dan defendan. Melalui tindakan ini plaintif-plaintif menuntut, antara lain, pelbagai pengisytiharan, RM2.6 bilion sebagai ganti rugi teladan dan RM42 juta sebagai ganti rugi teruk kepada Kerajaan Malaysia. Defendan memfailkan permohonan untuk membatalkan saman plaintif atas alasan bahawa defendan sebagai Perdana Menteri tidak boleh di sisi undang-undang dianggap sebagai penjawat awam atau pegawai awam dan oleh itu adalah jelas salah bagi plaintif untuk mendakwa beliau atas tort misfeasans dan tort pelanggaran fidusiari dalam jawatan awam. Permohonan pembatalan disokong oleh afidavit yang diangkat sumpah dan disahkan oleh defendan. Ini adalah suatu permohonan oleh plaintif-plaintif untuk memeriksa balas defendan berhubung afidavit yang dibuat oleh beliau untuk menyokong permohonannya untuk membatalkan guaman plaintif-plaintif ('afidavit'). Plaintif-plaintif berhujah bahawa tiga syarat yang perlu untuk mewajarkan pemeriksaan balas telah dipenuhi dan terdapat keperluan untuk memeriksa balas defendan kerana kedua-dua pihak telah mempertikaikan penyataan satu sama lain. Plaintif-plaintif juga berhujah bahawa defendan telah mengemukakan bahawa defendan telah bercanggah dengan dirinya sendiri dalam afidavit dengan mengatakan beliau bukannya seorang penjawat awam atau pegawai awam tetapi pada masa yang sama menegaskan bahawa plaintif-plaintif telah cuba menghalaunya daripada jawatan awam. Pada dasarnya, defendan mengakui bahawa mahkamah mempunyai budi bicara sama ada untuk membenarkan pemeriksaan balas, yang bergantung kepada fakta-fakta setiap kes tertentu. Walau bagaimanapun, defendan berhujah bahawa tiada konflik dalam apa yang dinyatakan dalam afidavit sebagai penyataan-penyataan yang dibuat dalam afidavit yang disahkan hanya atas nasihat oleh peguam caranya. Oleh itu, defendan berhujah tiada tujuan berguna dengan mengarahkan satu pemeriksaan balas kerana apa yang dinyatakan dilindungi oleh keistimewaan undang-undang profesional, yang memberikan hak kepada beliau untuk tidak menjawab. Defendan selanjutnya berhujah bahawa fakta sama ada beliau adalah seorang pegawai awam adalah hanyalah satu persoalan undang-undang yang tidak memerlukan pemeriksaan balas.

Diputuskan, menolak permohonan:

(1) Walaupun A 38 k 2(2) Kaedah-Kaedah Mahkamah 2012 membenarkan untuk permohonan ini difailkan, mahkamah ini mempunyai budi bicara sama ada untuk membenarkan atau tidak membenarkan permohonan

untuk memeriksa balas defendan. Seterusnya, meskipun kebenaran diberikan, perlu dihargai bahawa permintaan bagi pemeriksaan balas jarang diberikan. Sekiranya mahkamah membenarkan pemeriksaan balas deponen berhubung afidavit untuk permohonan interlokutori atas sebab-sebab yang sedikit, permohonan ini tidak dapat tidak akan menyebabkan masa dan usaha untuk menyediakan afidavit keterangan tidak bermakna. Oleh itu, melainkan jika dapat ditunjukkan bahawa permohonan tersebut adalah relevan dan penting, permohonan untuk pemeriksaan balas tidak seharusnya dibenarkan (lihat perenggan 39–40 & 45–48).

(2) Selepas meneliti tiga syarat pemeriksaan balas seperti yang dinyatakan dalam kes *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638 ('kes *Tetuan Kumar*') adalah jelas bahawa dua syarat pertama yang dikenakan agar pemeriksaan balas dipenuhi, di mana plaintif telah menjawab dan mempertikaikan bahagian relevan berhubung afidavit defendan dan mencadangkan pemeriksaan balas yang dicadangkan adalah relevan dengan isu yang dibangkitkan dalam permohonan defendan untuk membatalkan guaman plaintif-plaintif. Walau bagaimanapun, pihak plaintif tidak membuktikan syarat ketiga dalam kes *Tetuan Kumar* kerana sememangnya terdapat bukti mencukupi, material atau asas untuk mendengar pembatalan sepertimana yang dikemukakan defendan berdasarkan undang-undang. Syarat-syarat dalam kes *Tetuan Kumar* tidak ditetapkan sebagai alternatif tetapi kumulatif. Oleh itu, ketiga-tiga syarat perlu dipenuhi tetapi plaintif-plaintif gagal membuktikan syarat ketiga (lihat perenggan 50–54).

(3) Hujahan plaintif bahawa pemeriksaan balas adalah penting kerana percanggahan dalam afidavit adalah tanpa merit. Walaupun benar bahawa defendan telah bercanggah dengan dirinya sendiri, plaintif-plaintif masih boleh mempertikaikan hal ini apabila berhujah tentang merit pembatalan tanpa perlu menyoal balas defendan sekarang. Pendek kata, percanggahan, jika ada, seharusnya ditangani dalam hujahan kedua-dua pihak semasa permohonan pembatalan. Begitu juga, kredibiliti defendan mungkin dicabar oleh plaintif-plaintif sekarang tetapi keputusan mengenai kredibiliti beliau tidak dapat diputuskan sekarang. Oleh itu, dakwaan plaintif mengenai afidavit yang dipersoalkan perlu diputuskan apabila pembatalan didengar (lihat perenggan 55–59 & 63).

(4) Isu sama ada 'jawatan awam' adalah persoalan fakta yang perlu ditentukan terlebih dahulu, meskipun benar, akan bermakna sedikit atau tiada maknanya kepada permohonan ini untuk menyoal balas defendan. Mahkamah akan lebih cenderung untuk menentukan maksud istilah tersebut tanpa input daripada defendan dalam pemeriksaan balas pada

peringkat ini. Dalam keadaan ini, permohonan plaintif-plaintif ini tidak patut dibenarkan. Selanjutnya, kedudukan plaintif tidak diprejudiskan dan dikompromi oleh keengganan untuk meluluskan permohonan plaintif-plaintif ini (lihat perenggan 60 & 71).

(5) Defendan dan mana-mana deponen lain kepada afidavit dijangka kekal dengan dakwaan yang dibuat dalam afidavit mereka. Di bawah s 126(1) Akta Keterangan 1950 hanya peguam bela defendan diestop daripada mendedahkan komunikasinya dengan defendan melainkan jika defendan memberi kebenaran. Tiada had yang ditetapkan dalam peruntukan untuk defendan jelaskan apa yang telah dinasihatkan atau disampaikan kepadanya melalui peguam bela atau peguam caranya. Walau bagaimanapun, adalah jelas bahawa afidavit yang dipersoalkan tidak perlu diputuskan sekarang tetapi hanya apabila permohonan pembatalan didengar (lihat perenggan 64–67).]

Notes

For cases on affidavit evidence, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 561–575.

For cases on affidavit in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 406–622.

Cases referred to

Balwant Singh Purba v R Rajasingam [1987] CLJ Rep 468, HC (refd)

Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal [2014] 2 MLJ 49, CA (refd)

Edmund Ming Kwan @ Kwaun Yee Ming, Edmund v Extra Excel (Malaysia) Sdn Bhd & Ors (Part 1) [2007] 7 MLJ 250, HC (refd)

Gan Chong Guan Transport Sdn Bhd v Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors [2012] 4 MLJ 799, CA (refd)

Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (refd)

Paruvathy a/p Palany v Sathiasealan a/l Govindasamy [1999] 5 MLJ 151, HC (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Regional Centre for Arbitration v Ooi Beng Choo & Anor [1998] 2 MLJ 383, HC (refd)

Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd [2007] 4 MLJ 638, CA (consd)

Legislation referred to

Evidence Act 1950 s 126(1)

Rules of Court 2012 O 38 rr 2(2), (3)

Haniff Khatri Muhammad (Rafique Rashid Ali, Aidil Khalis and Mohd Idzan

Iswatt with him) (Haniff Khatri) for the plaintiffs.
Cecil Abraham (Rishwant Singh, Norhazira Abu Haiyan and Nik Nuraisha Alia Hanapi with her) (Hafarizam Wan & Aisha Mubarak) for the defendant.

Abu Bakar Jais J:

INTRODUCTION

[1] This is an application by the plaintiffs to cross-examine the defendant because of the affidavit sworn and affirmed by the latter in his application to strike out the plaintiffs suit. The plaintiffs present application is filed pursuant to O 38 r 2(2) and (3) of the Rules of Court 2012 ('the ROC').

[2] The application is therefore interlocutory in nature, filed for the limited purpose as indicated and not substantially affecting the crux of the dispute between the parties in the main suit.

BACKGROUND FACTS

[3] The first plaintiff is the former Prime Minister of Malaysia of 22 years. The second and third plaintiffs, like the first plaintiff are former members of UMNO, the main political party in a coalition forming the present government.

[4] The defendant is the current and sixth Prime Minister of Malaysia. He is also the President of UMNO and Chairman of Barisan Nasional ('BN'), the coalition.

[5] All three plaintiffs are up in arms against the defendant for alleged financial improprieties in a company wholly owned by the Government of Malaysia, 1Malaysia Development Bhd ('1MDB'). From their statement of claim, it is indicative that they subscribe to this belief because of initial news reports from among others, Sarawak Report and Wall Street Journal regarding these alleged wrongdoings and other events happening subsequently to their understanding, lending credence to that belief.

[6] The defendant is the Chairman of the Board of Advisors of 1MDB. The allegation among others is that at least the amounts of RM2.6 billion and RM42m went into the personal bank accounts of the defendant from SRC International Sdn Bhd a subsidiary of 1MDB without any justification whatsoever.

[7] The former Attorney General of Malaysia ('AG') subsequently headed a task force investigating the alleged fund transfer into the personal bank

accounts of the defendant. The members of the task force include the former governor of the central bank, the head of the police force and head of the Malaysian Anti-Corruption Commission.

[8] Events ensued later with the termination effectively of the service of the former AG from his post in the midst of the investigation. In addition, four members of Parliament's Public Accounts Committee ('PAC') also investigating 1MDB were appointed to the cabinet, thus disqualifying them as members and affecting tremendously the said investigation by PAC.

[9] The plaintiffs make the allegation all these were orchestrated by the defendant as Prime Minister. The defendant is said to interfere and halt the investigation by using his office and power as the Prime Minister.

[10] The statement of claim of the plaintiffs also makes allegation that the government machinery was used to harass and intimidate those who are critical of 1MDB and the defendant. These include taking actions against news agencies such as the Edge Media Group for allegations of inaccurate reports pertaining to 1MDB. It is also alleged members of the opposition critical of the defendant and 1MDB had been banned for overseas travel without reasons. Further the then Deputy Prime Minister, Tan Sri Muhyiddin Hj Mohd Yassin ('TS Muhyiddin') who had allegedly demanded the defendant to come clean on 1MDB was also removed from his post. Also dismissed was Minister of Rural and Regional Development, Dato Seri Hj Mohd Shafie bin Hj Apdal ('DS Mohd Shafie') who publicly called on the defendant to explain the purported financial scandal of 1MDB. All these too are alleged by the plaintiffs to be attributable to the defendant as Prime Minister.

[11] The statement of claim of the plaintiffs asserts that all three have the right to bring action against the defendant on the tort of misfeasance in public office and/or tort of breach of fiduciaries in public office. In fact the plaintiffs state that they are bringing this action against the defendant in his personal capacity for committing both torts.

[12] The prayers sought by the plaintiffs from this court include a declaration that the defendant committed the tort of misfeasance in public office and/or tort of breach of fiduciaries in public office because of interference and obstruction in the investigations pertaining to 1MDB and other related companies. Also sought is that the defendant pays the amount RM2.6 billion as exemplary damages and the amount RM42m as aggravated damages to the Government of Malaysia.

THE DEFENDANT'S APPLICATION

[13] Prior to the current application of the plaintiffs, the defendant had filed his application to strike out the plaintiffs' suit on the basis that the defendant as the Prime Minister cannot be legally considered as a public servant or public officer. Therefore the defendant is of the view it is plainly wrong for the plaintiffs to sue him based on the torts of misfeasance in public office and/or tort of breach of fiduciaries in public office. This assertion became the basis for the application of the defendant to strike out the plaintiffs' suit. In turn, this affidavit of the defendant on this issue supporting his application for striking out forms the basis of the plaintiffs current application to cross-examine the former.

[14] This court had already ruled that the defendant's striking out application shall be heard only after the current application of the plaintiffs be determined as it's only appropriate that the plaintiffs' present application be heard first. For having the striking out application be decided first, would render the plaintiffs' current application meaningless.

THE PLAINTIFFS' ARGUMENTS

[15] Alluding to the Court of Appeal's case of *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638, the plaintiffs submitted that the three conditions laid down in that case to justify cross-examination have already been satisfied by them. First, they had fulfilled the condition that they must reply and dispute the relevant part of the defendant's affidavit. Second, the proposed cross-examination is relevant to the issue raised in the defendant's application to strike out the plaintiffs suit and thirdly there is still a need for cross-examination as it would advance the cause of justice as the affidavit evidence or contemporaneous documents on the issue to be cross-examined is not sufficient based just on affidavits filed alone for the court to decide.

[16] For the first condition as explained above, the plaintiffs submitted there is a need for cross-examination of the defendant since both parties had disputed the assertions of each other and thus in the absence of oral testimony, this court should only be confined in its decision to the undisputed issues and facts not contested by either party. Therefore when there are disputed issues, it is only right that cross-examination be allowed for this court to come to a just and fair decision. This cannot be achieved if the court is confined in its decision based only on undisputed issues and facts.

[17] For the second condition as narrated, the plaintiffs contended the defendant contradicted himself in his affidavit for the striking out of the

plaintiffs suit on his position as the Prime Minister by saying he is not a public servant or public officer but at the same time asserting that the plaintiffs attempt to drive him from public office.

[18] For the submission on this contradiction, firstly the plaintiffs referred to specifically paras 7 and 8 of that affidavit of the defendant.

[19] Paragraph 7 of the defendant's affidavit states:

> I am further advised by my solicitors and verily believe such advice to be true that *I am not a member of the public service or a public officer in my pleaded capacities as Prime Minister, Minister of Finance, Chairman of BN and President of UMNO*. Accordingly this among other reasons, results in the purported cause of action not being able to get off the ground and accordingly justifies this action being struck out and/or dismissed. (Emphasis added.)

[20] Paragraph 8 of the defendant's affidavit states:

> I am further advised by my solicitors and verily believe such advice to be true that the ingredients of the tort of misfeasance in public office have not been complied with by the Plaintiffs in respect of their purported first cause of action namely that —
>
> (a) *I am not a member of the public service or public officer* in my pleaded capacities as Prime Minister, Minister of Finance, Chairman of BN and president of UMNO;
>
> (b) The loss, if any, to the Plaintiffs have not been cause by the exercise of any power by myself as a public officer;
>
> (c) My acts, if any, as public officer (which are not admitted), are neither malicious nor illegal or unlawful or that it caused injury to the Plaintiffs. (Emphasis added.)

[21] Then the plaintiffs referred to para 25 of the defendant's affidavit which states:

> I am further advised by my solicitors and verily believe such advice to be true that there is simply no basis for this action and that there is no cause of action on the facts of this case. Further, I am advised by my solicitors and verily believe such advice to be true that this action is, in addition, scandalous, frivolous and vexatious and an abuse of the Court's process. I would go further and state for the record that this action is filed for a collateral and an ulterior purpose and that this is a clear abuse of process of this Honourable Court. The collateral and ulterior purpose and that this action seeks to serve is a purely political purpose and an attempt by the Plaintiffs, and in particular the 1st Plaintiff, to drive me from *public office*. I am advised by my solicitors and verily believe such advice to be true that the process of the courts of law are not intended to serve ulterior or political purposes and for this reason alone, this action should be struck out. (Emphasis added.)

[22] The plaintiffs submitted that paras 7 and 8 of the defendant's affidavit contradict para 25 of the same affidavit as stated above as paras 7 and 8 of the defendant's affidavit express the defendant's denial he is a public servant or public officer but para 25 of the same affidavit shows that the defendant asserts the plaintiffs attempt to drive him out from public office. Essentially the plaintiffs argued that paras 7 and 8 contradict para 25 of the defendant's own affidavit because since the defendant is of the view he is not a public servant or public officer, he cannot be driven out from public office. As such, the plaintiffs submitted it is only appropriate that the defendant be called for cross-examination on this contradiction to ascertain the actual nature of his employment. Thus the plaintiffs contended that the second condition as laid down in *Tetuan Kumar* that the proposed cross-examination is relevant to the issue raised in the defendant's application to strike out the plaintiffs suit is also satisfied by the plaintiffs.

[23] In addition the plaintiffs argued that para 24 of the defendant's affidavit for the striking out denies plaintiffs assertion that TS Muhyiddin and DS Mohd Shafie had been dismissed and four members of PAC were appointed into the cabinet thus rendering the investigation by the same greatly affected. According to the plaintiffs, this denial runs contrary to public knowledge upon which this court should take judicial notice. As the denial is untrue as against public knowledge, the plaintiffs submitted the defendant ought to be subjected to cross-examination.

[24] As for the third condition, the plaintiffs contended that cross-examination of the defendant is necessary as there is insufficient affidavit evidence or contemporaneous documents in the defendant's affidavit in support for this court to decide on the striking out on the issue whether the defendant is a public servant or public officer. This is especially so when the plaintiffs argued that there is contradiction as explained on this very issue in the defendant's affidavit supporting the application for striking out of the plaintiffs' suit.

[25] The plaintiffs also referred to the contention of the defendant that 'public officer' is a question of law and 'public office' is a question of fact which can be ascertained by this court by looking at the affidavits without the need to cross-examine the defendant. On this, the plaintiffs submitted that when there are question of law and question of fact, the question of fact must be determined first before the question of law can be decided. Hence the plaintiffs contended cross-examination is necessary for the defendant to explain what he meant by the term 'public office'. It is also argued that the attempt by the defendant to clarify that term at this stage is an afterthought only to avoid being called for cross-examination.

[26] Further the plaintiff submitted as the credibility of the defendant is being challenged with regard to the contradictions in his affidavit, his credibility can only be tested by cross-examination on these contradictions. It is also said that this court should allow the cross-examination of the defendant whenever there is contradiction in a particular affidavit of a deponent.

THE DEFENDANT'S ARGUMENTS

[27] In essence the defendant submitted this court has the discretion whether to allow for the cross-examination requested by the plaintiffs. And the discretion should be exercised depending on the facts of each particular case.

[28] The defendant also submitted there is no conflict between what is stated in paras 7 and 8 and para 25 of his affidavit for the striking out. In pith and substance, the defendant submitted there is no ostensible nor apparent conflict between paras 7, 8 and 25 of the defendant's affidavit.

[29] The defendant argued he did not depose paras 7 and 8 of his affidavit on his own personal knowledge but was merely stating what was advised to him by his solicitors. Cross-examination will elicit no useful purpose under this circumstance. Paragraphs 7 and 8 are matters of law upon advised by the defendant's solicitors.

[30] Even if cross-examination is ordered, the defendant at the most could only say he was advised by his solicitors in affirming paras 7 and 8. He has no knowledge of the legal effect or position of what is affirmed and even if cross-examined on what was the legal advice proffered by his solicitors, that would be protected by legal professional privilege and therefore constitutes solicitor-client communication entitling him not to answer. In support of this very argument the defendant's cited s 126(1) of the Evidence Act 1950 that states:

> *No advocate* shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment. (Emphasis added.)

[31] The defendant further submitted whether he is a public officer is a pure question of law that requires no cross-examination.

[32] The defendant also argued that cross-examination of a deponent of an affidavit is very rarely granted. It is practically unheard for a striking out

application, the deponent of the affidavit in support is required to be cross-examined as this has the effect it would not be a plain and obvious case for striking out.

[33] As to matters in dispute, there should not be cross-examination at this stage as the cross-examination should only be allowed in the full trial of the case.

[34] There are statutory provisions defining the terms 'public office', 'public officer' and 'public services'. All these are purely legal in nature and therefore the defendant should not be subjected to cross-examination as he is not competent and not qualified on issue of law and the issue of interpreting the statutory provisions. Interpreting the law should be the province of this court.

[35] The word 'public office' should be accorded its normal parlance in the context it was used in para 25 of the defendant's affidavit. Again it is a matter for this court to interpret the meaning of that word.

[36] The interpretation of the relevant words does not require for the defendant to be present in court for cross-examination.

[37] At this stage, the focus of the court should only be on whether there is a plain and obvious case for striking out of the plaintiffs' suit. Cross-examination should only be addressed in the main trial itself if the striking out is not granted. The defendant further submitted this is at this stage not a trial on the issues contended in the main suit.

[38] This is not a bona fide application of the plaintiffs as it is filed with improper or collateral purpose. The cross-examination if allowed will mean the merits of the case will be cross-examined at this early stage on the interpretation of the words 'public officer' and 'public office' when this should only be addressed at the striking out stage and not now.

THE COURT'S FINDINGS

The relevant provision

[39] It should be pointed out that the provisions of O 38 r 2(2) and (3) of the ROC upon which the plaintiffs premised their application respectively state:

> O 38 r 2(2)
>
> In any cause or matter begun by originating summons and on application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or

the Court otherwise directs, but the Court *may*, on the application of any party, *order the attendance for cross-examination of the person making any such affidavit*, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

O 38 r 2(3)

Notwithstanding paragraph (1) or (2), the Court may, if it thinks just, order that evidence of a party or any witness or any part of such evidence be given otherwise than by witness statement at the trial or hearing of any cause or matter. (Emphasis added.)

[40] Although O 38 r 2(3) of the ROC is less relevant, it is clear that the provision of O 38 r 2(2) of the ROC as noted above allows for the present application to be filed.

The approach taken

[41] As this is as stated an interlocutory application, I should be reminded I ought not to deal with the merits of the case proper, the main suit. If I do that, I might be objected of hearing the main suit, if it does come to that stage (in view of the fact there is the application to strike out the plaintiffs' suit) as I may have formed certain decisions or expressed certain opinions in respect of the issues brought for the main suit.

[42] In fact I will go a step further in saying not only must I not deal with the merits of the substantive case now, I should also refrain from judging the merits of the defendant's application for the striking out of the plaintiffs' suit at this point of time.

[43] At this stage, I should not be making any statements that might indicate my inclinations towards any decisions apart from the present application. As I pointed out, there are still the substantive suit and the application for striking out before this court.

[44] I should also state that for reasons that will become apparent in a short while, I need not deal with all the issues raised by both parties in deciding the present application. Deciding only on certain issues in respect of this application now would be more than sufficient to determine the outcome of the same.

The discretion of the court

[45] Both parties though in serious dispute as reflected in the present case, at least at this stage, can see eye to eye, in their agreement that in law, for the

present application of the plaintiffs, this court has the discretion whether to grant or not the request to cross-examine the defendant. This is after all quite established as noted by a host of cases. See *Edmund Ming Kwan @ Kwaun Yee Ming, Edmund v Extra Excel (Malaysia) Sdn Bhd & Ors (Part 1)* [2007] 7 MLJ 250, *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151 and *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189 to name a few.

[46] In fact in *Regional Centre for Arbitration v Ooi Beng Choo & Anor* [1998] 2 MLJ 383 it is stated that it is settled law that the court retains an absolute discretion whether or not to allow to cross-examine a deponent on his affidavit.

[47] Further despite the discretion given, it ought to be appreciated that the request for cross-examination is rarely given as pointed by Lim Beng Choon J in *Balwant Singh Purba v R Rajasingam* [1987] CLJ Rep 468 where he said:

> This is an application made by the plaintiff for leave pursuant to O 38 r 2(3) [RHC] to cross-examine the defendant in respect of the affidavit made by him in support of his application to set aside the interim injunction granted by this court on 18 December 1986. I dismissed this application after hearing the submissions of counsel of the respective parties.
>
> For purpose of this judgment I need only mention two of the principles. The first one is mentioned in the following passage appearing at p 592 of the *English Supreme Court Practice* [1979] Vol 1:
>
> > There is a discretion as to ordering cross examination on affidavits filed on interlocutory applications. Cross examination upon affidavits sworn in applications for interlocutory injunctions is *very rare*. (Emphasis added.)

[48] I would add that if the courts were to allow cross-examination of a deponent of an affidavit for interlocutory applications for the slightest reasons, these applications will inevitably render the time and effort to prepare the affidavit evidence meaningless. Unless it can be shown that it is relevant and necessary such applications for cross-examination should not be allowed.

The effect of the discretion

[49] Although the discretion is given to this court in determining the outcome of the plaintiffs current application, that discretion must still be judicially exercised and of course I am not at liberty at my own whim and fancy to decide it according to what I singularly wish. On this, the learned Raja Azlan Shah AG Chief Justice Malaya (as he then was) in the case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 said:

> ... I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under s 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. *Unfettered discretion is a contradiction in terms* ... (Emphasis added.)

Tetuan Kumar's conditions

[50] Perusing *Tetuan Kumar*'s three conditions imposed for the cross-examination, I find that the first condition has been satisfied by the plaintiffs in that they had replied and disputed the relevant part of the defendant's affidavit. I see this in para 5 of the plaintiffs' affidavit in support of their current application where they disputed the assertion of the defendant that he is not a member of the public service or he is a public officer.

[51] On the second condition, I am also of the finding that the proposed cross-examination is relevant to the issue raised in the defendant's application to strike out the plaintiffs' suit. This is with regard to the contention of the defendant he is not a public officer but bearing in mind at the same time the defendant said in his affidavit that he is being driven by the plaintiffs from public office. At least at first glance, it seems there is a contradiction. However whether at this stage I need to find there is indeed contradiction will be explained in the course of this judgment.

[52] As for the third condition, respectfully I am unable to agree with the plaintiffs contention that cross-examination of the defendant is necessary as the plaintiffs submitted there is insufficient affidavit evidence or contemporaneous documents in the defendant's affidavit in support for this court to decide on the striking out on the issue whether the defendant is a public servant or public officer. I disagree with the plaintiffs here because the defendant contention on whether he is a public servant or public officer is a question of law. At least that is what is submitted by the defendant. As it is submitted to be a question of law, the defendant's evidence now should be straightforward and need not be too detailed as compared to a question of fact. That is also why there is no need to be elaborate in his affidavit supporting the application for striking out. In fact it is common knowledge as a general principle, question or issue of law need not even be pleaded. See the Court of Appeal's decisions in *Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal* [2014] 2 MLJ 49 and *Gan Chong Guan Transport Sdn Bhd v Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors* [2012] 4 MLJ 799.

[53] A word of caution is necessary at this stage. Am I at this stage believing it is a question of law? No, not at this stage, that will only be decided after I hear the arguments for the striking out. As I pointed out, I should not be prejudging

the merits of the striking out now. That will have to wait for another time and date. As for now, I am only saying I don't agree that the plaintiffs have proven the third condition in *Tetuan Kumar* because there is indeed sufficient evidence, material or basis to hear the argument on striking out. Again there is sufficient material or basis to hear the striking out as the defendant submitted on a point of law. As earlier stated it ought to be straightforward. At the risk of repetition, it must again be stressed it is a point of law says the defendant but whether it is so will be determined later. Therefore I say at this stage now there is no need for cross-examination of the defendant.

[54] Before we leave this issue on the conditions of *Tetuan Kumar* and whether the plaintiffs have fulfilled these conditions, there is one remaining point on this issue. It is on the fact that these conditions are not set in the alternative but cumulative. Reference to *Tetuan Kumar* will allow one to appreciate that the conditions are cumulative in nature. Meaning all three conditions must be satisfied and not just any one of them. Like I say, the plaintiffs had failed to prove the third condition.

Did the defendant contradict himself

[55] As explained, the plaintiffs submitted the defendant contradicted himself by saying he is not a public officer but at the same time asserting the plaintiffs is attempting to drive him out from public office. Therefore the plaintiffs say bring on the defendant for cross-examination.

[56] First assuming I agree there is contradiction, must the defendant be called for cross-examination at this stage? No I don't think so. Even assuming he contradicted himself, the plaintiffs could still assert this in the submission for the striking out without letting the defendant to explain himself before the submission on the striking out. In fact it is quite puzzling why the plaintiffs want to allow the defendant to explain himself by cross-examining him prior to arguments on striking out. Is it not to the plaintiffs own benefit to leave this untouched if they strongly believe the defendant contradicted himself? I leave this question unanswered for the simple reason as I have indicated that I should not be prejudging the merits of the striking out application at this stage. If I answer that question in the affirmative, then I could rightly be accused of already preconceiving a decision in favour of the plaintiffs for the striking out. That is why I should not be answering that question now. I am only highlighting at this stage, the fact that even if it is true the defendant contradicted himself, by their own belief of the contradiction, the plaintiff could still argue this when arguing the merits of the striking out without the need to cross-examine the defendant now. Say it out that the defendant contradicted himself when the striking out is heard.

[57] The same applies for the word 'public office'. Whether it should be accorded its normal parlance in the context it was used in para 25 of the defendant's affidavit is a matter to be argued for the striking out. This court will at that stage interpret the meaning and context of that word.

[58] Second, am I saying the defendant at this stage contradicted himself? No I am not. Am I saying at this stage he did not contradict himself? No I am not. I will say my piece on this when the time is right. When is the right time? The right time is after I hear arguments for the striking out. Must the defendant be cross-examined now to better assist everyone for the arguments and decision for striking out? No I don't think so. Without cross-examination at this stage, parties can still submit their points of contention for the striking out and I can decide the outcome of the same. The plaintiffs can still submit that the defendant contradicted himself and the defendant can argue his point of law on his position as Prime Minister.

[59] The same reasoning applies for the assertion that TS Muhyiddin and DS Mohd Shafie were not allowed to continue their service and four members of PAC who were later appointed into the cabinet thus rendering the investigation by the same greatly affected. Even if it is true that the defendant's denial on this does not accord with public knowledge, there is no reason to cross-examine the defendant at this stage. Let it remain contradicted as the plaintiffs perceived it and for the plaintiffs to submit on the same for the striking out. I am of the opinion that can still be done without the need to cross-examine the defendant. Again I shall make the decision on this alleged contradiction after I hear submissions by both parties for the striking out.

'Public Office' – Question of fact

[60] As to the issue whether 'public office' is a question of fact which must be determined first before question of law as contended by the plaintiffs, I am of the finding even if it is true that is so, the cross-examination of the defendant on this term will be of no or little significance because this court is more likely to determine the meaning of that term without the input of the defendant in cross-examination at this stage. This court with the assertion as in the affidavit of the defendant can and should be able to arrive at whatever decision regarding that term without the need to cross-examine the defendant at this stage.

[61] Further for the particular term 'public office' now, even if I agree that this is a question of fact, I see no reason why it could not be determined at the same time as the question of law on 'public officer' as the defendants puts it. I am not persuaded to think that this must be determined first before the question of law.

The defendant's credibility

[62] As noted the plaintiffs also argued that since there is contradiction on the part of the defendant, he therefore ought to be subjected to cross-examination. The plaintiffs submitted cross-examination is appropriate at this stage when the defendant's credibility is challenged.

[63] On this submission, I have already said that I think whether the defendant contradicted himself should be decided after the submission on the striking out and not now. The credibility of the defendant may be challenged by the plaintiffs now but that decision on his credibility is not to be decided now. In fact the credibility of the defendant as the plaintiffs put it can still be challenged in the striking out because still the assertion that the defendant contradicted himself is available when the striking out is heard. Therefore it is not true to say the defendant must be cross-examined now. What good would the cross-examination do now as the plaintiffs would not in all probability abandon their challenge on the defendant's credibility when the striking out is heard despite such cross-examination.

Affidavit upon advised

[64] What is the effect of statements made in an affidavit said to be affirmed only upon advised by solicitors? What should be the interpretation of that kind of statements? Can it be considered it is still statements by the deponent of the affidavit or should it be considered that such statements are assertions of the solicitors alone and the deponent has no knowledge at all upon such assertions? This is in regard to the statements the defendant made in respect of paras 7, 8 and 25 of his affidavit as alluded earlier.

[65] I find again that this issue should be decided after the application for striking out is heard. There is no hindrance for the plaintiffs to bring this issue when the same is argued. The cross-examination of the defendant is unnecessary as the assertions that had been made by the defendant is clear from his affidavit. He has already expressed in paras 7 and 8 of that affidavit that he is a not a public servant or public officer and in para 25 of the same affidavit, he has indicated that the plaintiffs are attempting to drive him out from public office. It is clear as daylight what he has said pertaining to these paragraphs of his affidavit. Hence there is no need to cross-examine the defendant further on this issue at this stage. The defendant and any other deponents of an affidavit are expected to stand by the assertions made in their affidavit. After all it is sworn on the belief that what are stated are true. In this regard even if there is cross-examination, the defendant will not be able to explain more than what he has already affirmed in his affidavit especially when he is not legally trained. The repercussion of his assertions as reflected in those paragraphs of his

affidavit is the domain of his counsels and the plaintiffs counsels to argue in the striking out. Hence the plaintiffs and defendant lawyers are invited to submit on the effect of these paragraphs of the affidavit when the striking out is heard without the need to cross-examine the defendant now.

Privileged communication

[66] I shall also address the submission of the defendant on s 126(1) of the Evidence Act 1950 that was highlighted earlier. It can be seen from the provision that only the defendant's advocate is estopped from revealing the communication he had had with the defendant unless the defendant consents. This does not apply to the defendant's personally. There is no bar stipulated in that provision for the defendant to explain what was advised or communicated to him by his advocate or solicitor. The provision prohibits the advocate but not the defendant. So as can be seen, it is incorrect to suggest that the defendant can refuse to answer questions on communication with his solicitors based on this provision. It is incumbent to explain the elaboration here is only in respect of that provision as against the defendant.

[67] However nothing turns on this as I have already explained my reasons for disallowing the cross-examination.

Collateral purpose

[68] Although it is contended by the defendant that the plaintiffs have a collateral purpose in wanting to cross-examine him, I would not venture to make a finding on this at this stage. The reasons that have been narrated to refuse the cross-examination are sufficient without the need to make a finding on this assertion of the defendant. Suffice to say that I am unable to agree with the reasons advanced by the plaintiffs for the request to cross-examine the defendant because of the grounds that are already narrated in this judgment.

CONCLUSION

[69] Both the plaintiffs and defendant agree that I am given the discretion to decide whether the present application ought to be allowed.

[70] The matters that I had considered in exercising my discretion include the three conditions of *Tetuan Kumar*, the scope of the application for the striking out and whether the assertions of the plaintiffs' in respect of the defendant's impugned affidavit should be decided now or only when the striking out is heard.

[71] Based on the all reasons explained, I do not agree the present application of the plaintiffs to cross-examine the defendant should be permitted. I also believe the position of the plaintiffs is not prejudiced and compromised for their arguments later in the defendant's attempt to strike out the suit despite the refusal of this court to grant the plaintiffs present application.

[72] Accordingly the plaintiffs application is dismissed.

Application dismissed.

Reported by Kohila Nesan